

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH JEFFEREY BRICE,

Defendant.

NO. CR-11-0075-LRS

**ORDER RE JANUARY 11, 2012
PRETRIAL CONFERENCE**

On January 11, 2012 a suppression hearing was held in Spokane, Washington to consider the following motions: Defendant's Motion to Suppress Statements (ECF No. 86; ECF No. 158¹); Defendant's Motion to Dismiss for Outrageous Government Conduct (ECF No. 80); Defendant's Motion to Dismiss Count 3 (ECF No. 91; ECF No. 160²); and Defendant's Motion for Bill of Particulars (ECF No. 108; ECF No. 164³). The Court placed all motions under advisement. Assistant United States Attorney Russell Smoot appeared on behalf of the Government; Matthew Campbell appeared on behalf of Defendant Brice.

¹This document is the equivalent, redacted version.

²This document is the equivalent, redacted version.

³This document is the equivalent, redacted version.

1 At the hearing, the court considered testimonial evidence from two
2 government witnesses: Special Agent (SA) Frank Harrill and SA Leland
3 McEuen. Defendant did not testify.

4 **BRIEF BACKGROUND**

5 On May 3, 2011, the Defendant, Joseph Jefferey Brice, was charged
6 by Indictment with one count of manufacturing an unregistered firearm
7 (destructive device), in violation of 26 U.S.C. § 5861(f). See ECF No.
8 1. On May 9, 2011, the Defendant was arrested on an outstanding warrant
9 that had been issued pursuant to the Indictment. On June 21, 2011, the
10 Government filed a Superseding Indictment (ECF No. 31), adding Count 2,
11 Distribution of Information Relating to Explosives, Destructive Devices
12 and Weapons of Mass Destruction pursuant to 18 U.S.C. §§842(p)(2) and
13 844(a)(2), and Count 3, Attempt to Provide Material Support to Terrorists
14 pursuant to 18 U.S.C. §§2339A(a), (b)(1-3).

16 **ANALYSIS**

17 **A. Defendant's Motion to Suppress Statements**

18 Defendant moves to suppress the statements taken from him on May 9,
19 2011, as allegedly violative of his Sixth Amendment constitutional
20 rights. Specifically, Defendant moves to suppress all statements,
21 including but not limited to the "timeline" prepared during his
22 interview; initialed photographs and documents related to the "Zion Job;"
23 and the fruits of the "consent searches", as that consent, according to
24 Defendant, was secured as part of the unconstitutional "interrogation."
25
26

1 The Court found that the agents' testimony was credible and
2 consistent.⁴ The evidence indicated Defendant was arrested on May 9,
3 2011. Early that morning (approximately 6:15 a.m.), and just out of bed,
4 Brice was transported from his residence in Clarkston, Washington to the
5 Clarkston Police Station, for an interview. On the way to the agent's
6 vehicle, the Defendant attempted to talk to the agents. SA McEuen
7 activated a hand-held recording device, placed in plain sight, to avoid
8 any misunderstandings. SA McEuen and SA Harrill told the Defendant of
9 the charge and that they wanted to explain the circumstances before the
10 Defendant continued in his insistence to talk to the agents. While in the
11 back of SA Harrill's vehicle, and prior to any questions, Brice was shown
12 copies of four warrants so he could read them. The agents testified
13 Brice was observed reading the warrants and was very talkative and
14 excited. Although the Defendant appeared eager to talk, the agents
15 testified that they worked hard to slow the Defendant down until they
16 could advise him of the charges and his Miranda warnings.

18 Once at the police station, at approximately 6:16 a.m., Brice was
19 given Miranda warnings, and provided with an FD-395 Advice of Rights
20 Form. Brice appeared to read the form (eyes moving across the form) and
21 signed the form at 6:19 a.m. At the beginning of the interview, Brice
22 was verbally advised what he was being arrested for, and Brice raised
23 questions that would indicate he had read and comprehended what he was
24

25 ⁴The Special Agents were excluded from the court room during each
26 other's testimony.

1 reading and what he was told. For instance, Defendant verbalized his
2 understanding of the present charge against him:

3 "Manufacturing, uh, uh, manufacturing an
4 unregistered firearm which is just the new, until
5 they make the new thing for explosives, that's what
it is."

6 ECF No. 93-3, at 6.

7 Defendant Brice also volunteered a comment that he thought he was
8 being charged with the same offense that had been charged against Kevin
9 Harpham.⁵

10 Defendant: I am not Kevin Harpham. I am not
11 anything like that.

12 Agent: We understand that.

12 Defendant: I have never, I don't hurt people, I don't
wanna hurt people.

13 ECF No. 93-3, at 10.

14 The testimony indicated that the Defendant understood his rights and
15 voluntarily signed the waiver of rights form in the presence of Special
16 Agents Harrill and McEuen. Before getting to the substance of the charge
17 in the original Indictment and the Defendant's other uncharged (at the
18 time) criminal activity, the agents advised Defendant that he could end
19 the conversation "whenever [he] want[ed]" and that he could "choose not
20 to answer questions." See ECF No. 93-3, at 10. Ultimately, despite the
21 Defendant's eagerness to talk to the agents, the Defendant was not asked
22 about the events relevant to Count One of the subsequent Superseding
23 Indictment until well into the interview process - after being advised
24

25 ⁵At the time, Harpham was charged in the well-publicized Martin
26 Luther King Day Parade attempted bombing.

1 of the pending charge in the original Indictment and executing an FBI
2 Advice of Rights form. See ECF Nos. 93-3, 93-4. The interview continued
3 for approximately four hours and was recorded in its entirety.

4 "The Sixth Amendment guarantees a criminal defendant 'the right ...
5 to have the Assistance of Counsel for his defense.'" *United States v.*
6 *Harrison*, 213 F.3d 1206, 1209 (9th Cir. 2000) (*quoting* U.S. Const. amend.
7 VI.). The Supreme Court has held that the Sixth Amendment right to
8 counsel attaches "at or after the initiation of adversary judicial
9 criminal proceedings—whether by way of formal charge, preliminary
10 hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406
11 U.S. 682, 689 (1972) (plurality opinion); *see also United States v. Karr*,
12 742 F.2d 493, 495 (9th Cir. 1984) (*citing United States v. Gouveia*, 467
13 U.S. 180, 104 S.Ct. 2292, 2296 (1984)). The Ninth Circuit noted, however,
14 that "attachment of the right alone does not guarantee a defendant the
15 assistance of counsel." *Harrison*, 213 F.3d at 1209. "A defendant also
16 must invoke the Sixth Amendment right by hiring a lawyer or asking for
17 appointed counsel." *Id.*

18
19 Defendant asserts that despite the fact that he was advised of the
20 fact that formal judicial proceedings had begun against him in the form
21 of being charged with a federal offense, signing a rights waiver, and
22 being advised that he would be going in front of the federal Magistrate
23 Judge, Defendant asserts that his "confession" was obtained in violation
24 of the Sixth Amendment.
25
26

1 The testimony indicates that Defendant asked if he could contact
2 some people. More specifically, Brice mentioned two people: his father
3 and girlfriend. Brice indicated his father would be waiting for him
4 [Defendant] to ride to work at 8:00 a.m. Brice also mentioned his
5 girlfriend as someone for him to contact, but quickly changed his mind
6 stating that he didn't want her to know or be contacted at her work as
7 she didn't know anything and Brice suggested she might be upset with him.
8 Despite being advised of his right to counsel before the questioning,
9 Brice appears to have validly waived the presence of counsel by failing
10 to request assistance of counsel.
11

12 In this case, the Defendant was advised of the pending charge and
13 subsequently executed an FBI Advise of Rights form, prior to the
14 post-arrest interview. Defendant was also told that he could end the
15 interview at any time. At the time, Brice eagerly responded to
16 agent-initiated custodial interrogation after he had been advised of his
17 rights. Defendant now seeks to suppress the result of his eagerness and
18 candor. Neither the facts nor the law support Defendant's attempt to use
19 the Sixth Amendment to retract his statements to the agents.
20

21 As for which statements/counts are relevant to this motion, the
22 Court finds that at the time of the interview, the only charged conduct
23 was the allegation of manufacturing an unregistered firearm, (destructive
24 device), in violation of 26 U.S.C. § 5861(f). Consequently, the Sixth
25 Amendment waiver analysis applies only to statements that were relevant
26 to the initial Indictment. All other statements relevant to Counts Two

1 and Three of the Superseding Indictment would remain under the Fifth
2 Amendment waiver analysis. In this case, Defendant was advised of the
3 pending charge in the initial Indictment and advised of his Miranda
4 warnings. The Court respectfully denies Defendant's Motion to Suppress
5 his post-arrest statements.

6 **B. Defendant's Motion to Dismiss for Outrageous Government Conduct**

7
8 Defendant seeks dismissal of Counts 2 and 3 of the Superseding
9 Indictment. Defense argues outrageous government conduct by, in effect,
10 creating a criminal conspiracy and inviting Brice to join it, for the
11 sole purpose of then charging him for doing that which the government
12 asked. Defendant asserts that there was "no existing criminal activity
13 known by the agents." See ECF No. 80, at 33. Defendant also states that
14 there was no existing organization for which to infiltrate. See ECF No.
15 80, at 35.

16 The United States responds that "[i]n order to show outrageous
17 government conduct, defendants must show conduct that violates due
18 process in such a way that it is 'so grossly shocking and so outrageous
19 as to violate the universal sense of justice.'" *U.S. v. Stinson*, 647
20 F.3d 1196, 1209 (9th Cir. 2011) (*quoting U.S. v. Restrepo*, 930 F.2d 705,
21 712 (9th Cir. 1991) (*quoting U.S. v. O'Connor*, 737 F.2d 814, 817 (9th
22 Cir. 1984)) (internal quotation marks omitted).

23
24 The United States argues that here, Defendant was already involved
25 in a continuing series of similar crimes, or the charged criminal
26 enterprise was already in process at the time the government agent became

1 involved. Second, the agent's participation was not necessary to enable
2 Defendant to continue the criminal activity. Third, the agent used
3 artifice and stratagem to ferret out criminal activity. The Ninth
4 Circuit case law indicates that although a defendant may have been
5 "lured" by the government into becoming involved with an undercover
6 operation does not itself make the government's conduct outrageous. See
7 *U.S. v. Garza-Juarez*, 992 F.2d 896 (9th Cir.1993).
8

9 The government indicates there is evidence that Defendant discussed
10 unlawful activities with people other than the agent(s).⁶ The Court
11 finds no evidence that the investigative techniques employed by the
12 government were outrageous as Defendant suggests. The Court concludes
13 that the evidence arguably supports a showing of predisposition to commit
14 the crimes charged (Counts Two and Three of the Superseding Indictment),
15 and therefore the evidence that a government agent(s) solicited,
16 requested or approached Defendant to engage in criminal conduct, standing
17 alone, is insufficient to constitute inducement. Finally, the current
18 record is devoid of evidence which would tend to show reluctance on the
19 part of Defendant to participate in the criminal activity he is charged
20 with or that he was resistant to the government's purported solicitation.
21

22 ⁶The government represents there is evidence that Defendant
23 discussed bank robbery plans with an associate, discussed robbing a FedEx
24 delivery truck with an associate, discussed bombing the Spokane Federal
25 Building with an associate, and constructed and detonated homemade bombs
26 with others.

1 Defendant's Motion to Dismiss For Outrageous Government Conduct is
2 respectfully denied.

3 **C. Defendant's Motion For Bill of Particulars**

4 Defendant moves for a Bill of Particulars in regard to Counts Two
5 and Three of the Superseding Indictment. Defendant asserts that those
6 Counts fail to provide sufficient notice of the crime charged and fail
7 to inform him of the nature and cause of the accusation(s) against him.
8 Defendant suggests that it is unclear whether the government deems a
9 single email or web post constitutes a charged offense, or whether it is
10 the entire body of communication(s). Defendant also argues the time
11 frame of Count Three spans almost six months- December 21, 2010 to May
12 8, 2011. Defendant argues the charge does not clarify when during this
13 six month period the offense allegedly occurred. Defendant notes the
14 government has produced thousands upon thousands of pages of documents,
15 many of which display email and internet activity. Count Three,
16 Defendant argues, does not clarify whether it considers the breadth of
17 the activity to constitute a single attempt, whether each act would
18 constitute a separate attempt, or whether there was a single attempt made
19 at some unspecified point during that time frame.
20

21 The government opposes this motion asserting that the Superseding
22 Indictment provides a "plain, concise, and definite written statement of
23 the essential facts constituting the offense[s] charged," pursuant to
24 Fed. R. Crim. P. 7(c). Furthermore, the government states it has
25 provided significant discovery, including search warrant affidavits, law
26

1 enforcement reports, and transcripts of grand jury testimony. Therefore,
2 the purpose served by a bill of particulars has been served and the
3 government requests this Court to deny Defendant's motion for a bill of
4 particulars for Counts Two and Three.

5 The bill of particulars has three functions: "to inform the
6 defendant of the nature of the charge against him with sufficient
7 precision to enable him to prepare for trial, to avoid or minimize the
8 danger of surprise at the time of trial, and to enable him to plead his
9 acquittal or conviction in bar of another prosecution for the same
10 offense when the indictment itself is too vague, and indefinite for such
11 purposes." *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976).
12 *Accord, United States v. Andrino*, 501 F.2d 1373, 1378 (9th Cir. 1974);
13 *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963). The denial
14 of a motion for a bill of particulars is within the discretion of the
15 district court; its decision will not be disturbed absent an abuse of
16 this discretion. *United States v. Clay*, 476 F.2d 1211, 1215 (9th Cir.
17 1973).

18
19 First of all, the Court finds that Count 2 of the Superseding
20 Indictment meets the requirements of Fed. R. Crim. P. 7(c) and is
21 sufficiently detailed and properly alleges the government's theory such
22 that Defendant can prepare an adequate defense. Count Three, however,
23 is more problematic given the sheer volume of discovery that has
24 purportedly been provided, which Defendant indicates results in less
25
26

1 clarity as to what the indictment charges, and given the Defendant's
2 recent motion to compel discovery.

3 Full discovery obviates the need for a bill of particulars. See
4 *U.S. v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979). After the hearing on
5 the instant motions, Defendant filed a Motion to Compel, ECF No. 147, on
6 January 19, 2012.⁷ Thus, the Court tentatively finds that the Motion for
7 Bill of Particulars should be denied without prejudice, with respect to
8 Count Three only. Once there has been provided full and complete
9 discovery to Defendant, he may revisit his motion for a Bill of
10 Particulars as to Count Three only, if from the indictment and the
11 government evidence which he receives, Defendant has not learned enough
12 of the charges against him to prepare for trial and to avoid surprise at
13 trial.
14

15 **D. Motion to Dismiss Count Three of Superceding Indictment**

16 Defendant argues Count Three is an attempt charge and alleges that
17 an attempt was made but not completed. Defendant theorizes that since the
18 charge does not involve a completed offense, it is difficult to gauge
19 when the government alleges that the attempt was made. Defendant
20 concludes that elements of the offense charged do not fairly inform him
21

22
23 ⁷Defendant moves the Court for an order directing the United States
24 to provide Mr. Brice with all discovery relating to the "tip" referenced
25 in affidavits submitted by Agent Leland McEuen and certifications
26 submitted by Assistant United States Attorney Russell Smoot.

1 of the charge against which he must defend nor enable him to plead an
2 acquittal or conviction in bar of future prosecutions for the same
3 offense.

4 The government disagrees and states Count Three of the Superseding
5 Indictment fully comports with Fed. R. Crim. P. 7(c)(1), provides
6 sufficient notice of the elements of the offense in a manner that fairly
7 informs Defendant of the charge against him, and enables him to plead an
8 acquittal or conviction in bar of future prosecutions.

9 The Court finds that based on its ruling above denying without
10 prejudice Defendant's Motion for Bill of Particulars as to Count Three
11 only, this motion must be denied as well.

12 **IT IS HEREBY ORDERED:**

13
14 1. Another pretrial conference is **SET** for **January 31, 2012 at**
15 **8:30 a.m. in Spokane, Washington.** At this hearing, the parties should
16 be prepared to argue any remaining pending motions.

17 2. Defendant's Motion to Suppress Statements, **ECF Nos. 86, 158,**
18 are **DENIED.**

19 3. Defendant's Motion to Dismiss for Outrageous Government
20 Conduct, **ECF No. 80,** is **DENIED.**

21 4. Defendant's Motion to Dismiss Count Three, **ECF Nos. 91, 160**
22 are **DENIED.**

23 5. Defendant's Motion for Bill of Particulars, **ECF Nos. 108, 164**
24 are **DENIED** with respect to Count Two of the Superseding Indictment and
25
26

1 **DENIED without prejudice** with respect to Count Three of the
2 Superceding Indictment.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this order and to provide copies to all counsel, the U.S. Probation
5 Office, and the U.S. Marshal.

6 **DATED** this 24th day of January, 2012.

7
8
9 ***s/Lonny R. Suko***

10 _____
11 LONNY R. SUKO
12 United States District Judge
13
14
15
16
17
18
19
20
21
22
23
24
25
26